No. ____

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In The Supreme Court of the United States

LASTING BEAUTY, L.L.C. and DENISE HUMPHRIES,

Petitioners,

v.

CITY OF CHESAPEAKE and JAMES T. DAVIS, CZA, Zoning Administrator,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

Kevin E. Martingayle
Counsel of Record
STALLINGS & BISCHOFF, P.C.
2101 Parks Avenue, Suite 801
Post Office Box 1687
Virginia Beach, Virginia 23451
(757) 422-4700

Counsel for Petitioners

THE LEX GROUP^{DC} ♦ 1750 K Street N.W. ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦ www.thelexgroupdc.com

QUESTIONS PRESENTED

1. Did the courts below err in failing to determine that the subject City zoning scheme governing tattooing unconstitutionally burdens free speech and expression rights guaranteed by the United States Constitution?

2. Did the Courts below err in failing to determine that the subject City zoning scheme, facially and as applied, denies equal protection and due process rights guaranteed by the United States Constitution?

LIST OF PARTIES

The petitioners are Lasting Beauty, LLC and Denise Humphries, and the Respondents are City of Chesapeake, a municipal corporation, and James T. Davis, CZA, Zoning Administrator.

CORPORATE DISCLOSURE STATEMENT

Petitioner, Lasting Beauty, LLC is a Virginia company that has no parent corporation. No publicly-held company holds 10% or more of Petitioner's stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND CITY ZONING ORDINANCE INVOLVED 1

STATEMENT OF THE CASE 3

A. Overview 3

B. Prior tattoo litigation and the City's former ban 4

C. The history of this case 4

REASONS WHY THE WRIT SHOULD BE GRANTED 5

A. Summary of Argument 5

B. Free Speech/Expression Issues 7

C. Equal Protection and Due Process 10

CONCLUSION 12

APPENDIX

TABLE OF AUTHORITIES

Page(s)

CASES

Bery v. City of New York,
97 F.3d 689 (2d Cir. 1996) 10

Board of Airport Comm'rs v. Jews for Jesus, Inc.,
482 U.S. 569 (1987) 7

Board of Supervisors v. Carper,
200 Va. 653, 107 S.E.2d 390 (1959) 11

Broadrick v. Oklahoma,
413 U.S. 601 (1973) 7

Brown v. Louisiana,
383 U.S. 131, 86 S. Ct. 719,
15 L.Ed.2d 637 (1966) 10

City of Chesapeake v. Ancient Art Tattoo Studio,
02 Va. S. Ct. UNP 012082 (2002) 4

Commonwealth v. Meuse,
1999 Mass. Super. Lexis 470,
10 Mass. L. Rep. 661 (Mass. Super. Ct. 1999) 8

Erie v. Pap's A.M.,
529 U.S. 277 (2000) 5

Lanphear v. Commonwealth of Massachusetts,
Mass. Superior Court Slip Opinion
99-1896-B (October 20, 2000), aff'd,
Commonwealth v. Lanphear,
50 Mass. App. Ct. 1107,
737 N.E.2d 1281 (2000) 7

MacNeil v. Board of Appeal of Boston,
2004 Mass. Super. LEXIS 282,
18 Mass. L. Rep. 153 (Mass. Super. Ct. 2004)..... 8

Nike, Inc. v. Kasky,
539 U.S. 654 (2003) 5

People v. O'Sullivan,
96 Misc. 2d 52 (N.Y. Misc. 1978) 9

Schad v. Mount Ephraim,
452 U.S. 61 (1981) 12

Smith v, Goguen,
415 U.S. 566, 94 S. Ct. 1242,
39 L.Ed.2d 605 (1974) 9

Spence v. Washington,
418 U.S. 405, 94 S. Ct. 2727,
41 L.Ed.2d 842 (1974) 9

State ex. rel. Medical Licensing Bd. v. Brady,
492 N.E.2d 34 (Ind. Ct. App. 1986)..... 9

State v. White,
348 S.C. 532, 560 S.E.2d 420 (2002).....9

Stephenson v. Davenport,
110 F.3d 1303 (8th Cir. 1997) 9

Stromberg v. California,
283 U.S. 359, 51 S. Ct. 532,
75 L.Ed. 1117 (1931).....10

Texas v. Johnson,
491 U.S. 397, 109 S. Ct. 2533,
105 L.E.2d 342 (1989).....9

Tinker v. Des Moines School District,
393 U.S. 503, 89 S. Ct. 733,
21 L.Ed.2d 731 (1969) 9

Tory v. Cochran,
544 U.S. 734 (2005) 5

United States v.
Playboy Entertainment Group. Inc.,
529 U.S. 803 (2000) 5

Village of Willowbrook v. Olech,
528 U.S. 562 (2000) 11

Virginia v. Black,
538 U.S. 343 (2003) 5

Virginia v. Hicks,
539 U.S. 113 (2003) 5

Yurkew v. Sinclair,
495 F. Supp. 1248 (D. Minn. 1980) 9

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. I ..... passim

U.S. CONST. amend. XIV 2

STATUTES

28 U.S.C. § 1257 1

Va. Code § 54.1-700 3

ORDINANCES

Chesapeake City Ordinance § 8-601 4

Chesapeake City Ordinance § 8-601(C)(27) 2

OTHER AUTHORITIES

Anthony Jude Picchione,
Tat-too Bad for Municipalities: Unconstitutional Zoning of Body-Art Establishments, 84 B.U.L. Rev. 829 (June, 2004) 9

Bobby G. Frederick,
Tattoos and the First Amendment - Art Should Be Protected As Art: The South Carolina Supreme Court Upholds the State's Ban on Tattooing, 55 S.C. L. Rev. 231 (Fall, 2003) 9

Virginia Board of Health Professions Report (January 3, 1994) 7, 8

PETITION FOR WRIT OF CERTIORARI

Lasting Beauty, LLC and Denise Humphries (hereinafter referred to collectively as "Humphries") respectfully petition this Court for a writ of certiorari to review the judgment of the Circuit Court of the City of Chesapeake (the "trial court"), and the decision of the Virginia Supreme Court denying review. The trial court held that tattooing is not sufficiently "communicative in nature to warrant protection under the First Amendment" and rejected Humphries' free speech, equal protection and due process arguments.

OPINIONS BELOW

The trial court issued a memorandum opinion on March 23, 2006 (reprinted in the appendix herein at App. 2-15), followed by a Judgment and Final Order entered May 3, 2006 (App. 17-19). The Virginia Supreme Court initially denied review by Order dated October 25, 2006 (App. 1), and then denied a Petition for Rehearing by Order dated January 19, 2007 (App. 16).

JURISDICTION

The Order of the Virginia Supreme Court refusing Humphries' Petition for Rehearing was entered on January 19, 2007 (App. 16). This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND CITY ZONING ORDINANCE INVOLVED

The First Amendment to the Constitution of the United States states as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Section One of the Fourteenth Amendment to the Constitution of the United States states as follows:

> § 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Chesapeake City Ordinance § 8-601(C)(27) states as follows:

> The following conditions shall apply to specific uses, as indicated in the "condition" column in the uses schedule:
>
> *****
>
> 27. Tattoo parlors shall be established and operated in accordance with applicable provisions in chapter 38 of the City Code. Additionally, in order to protect and preserve the character of residential neighborhoods,

residential property values, the vitality of commercial districts and the overall quality of life in Chesapeake, and further to prevent detrimental effects on educational facilities and public recreation areas, no tattoo parlor shall be located within 1,000 feet of any other tattoo parlor, private and public schools, day care facilities, public parks, religious institutions or any property zoned or used for residential purposes.

STATEMENT OF THE CASE

A. Overview

Humphries is a performer of "intradermal micropigmentation". Legally, this service is defined and treated exactly the same as traditional tattooing. Code of Virginia § 54.1-700[1]. This appeal involves the City of Chesapeake's zoning scheme relating to tattooing and restrictions imposed on the activity.

The subject zoning allows tattooing only in the City's "industrial" districts ("M-l" and "M-2"), and only as a "conditional use". Further, it bans any tattoo establishment "within 1000 feet of any other

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[1] Section 54.1-700 provides these relevant definitions: "'Tattoo parlor' means any place in which tattooing is offered or practiced. 'Tattooer' means any person who for renumeration practices tattooing. 'Tattooing' means the placing of designs, letters, scrolls, figures, symbols or any other marks upon or under the skin of any person with ink or any other substance, resulting in the permanent coloration of the skin, including permanent make-up or permanent jewelry, by the aid of needles or any other instrument designed to touch or puncture the skin."

tattoo parlor, private and public schools, day care facilities, public parks, religious institutions or any property zoned or used for residential purposes." See ordinance § 8-601. See also the color-coded map in the record as Plaintiffs Exhibit 5, depicting the limited allowable areas.

B. Prior tattoo litigation and the City's former ban

Legal battles over tattooing are nothing new to the City of Chesapeake, and one was the subject of a previous appeal to the Virginia Supreme Court. Specifically, in a June 5, 2001 ruling (memorialized in an order dated June 21), a judge of the Chesapeake Circuit Court struck down the City's then-existing blanket ban on tattooing. Days later, the City repealed the ban and enacted new ordinances regulating tattooing and severely limiting where it would be allowed. In the meantime, the City also appealed the trial court ruling invalidating the ban, but because of the repeal of the provision struck down by the trial court, the Virginia Supreme Court found that the appeal was rendered moot. City of Chesapeake v. Ancient Art Tattoo Studio, 02 Va. S. Ct. UNP 012082 (2002). Although the parties in that appeal briefed and argued many of the same issues presented here -- including free speech -- the dismissal ended that appeal without any opinion being issued.

C. The history of this case

This case proceeded before the trial court as a declaratory judgment action and a trial was held September 1, 2005. Thereafter, a March 23, 2006 memorandum opinion was issued by the trial court

ruling against Humphries. Humphries responded by appealing to the Virginia Supreme Court and followed all of the necessary appellate rules and procedures.[2] The writ of appeal was denied on October 25, 2006. Because of the critical issues in this particular appeal, and also because of ongoing tattoo law conflicts in Chesapeake and other neighboring cities, a Petition for Rehearing was presented for consideration by the Virginia Supreme Court. It was denied by Order dated January 19, 2007.

REASONS WHY THE WRIT SHOULD BE GRANTED

A. Summary of Argument

This appeal presents to an opportunity for this Court to address and resolve an important conflict in constitutional jurisprudence. The specific issue is whether tattooists and their customers are protected by free speech, due process and equal protection principles, or whether localities are at liberty to engage in unrestrained regulation of and

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[2] In the Virginia Supreme Court, the Thomas Jefferson Center for the Protection of Free Expression, a free speech advocacy organization based in Charlottesville, Virginia, filed an "Amicus Curiae Memorandum of Support for Petitioners'/Appellants' Petition for Appeal" in which it agreed with Humphries that the trial court engaged in a flawed analysis and reached a clearly erroneous conclusion. This Court has accepted and reviewed several amicus briefs from this organization in recent years in cases involving important free speech issues. See e.g., Tory v. Cochran, 544 U.S. 734 (2005); Virginia v. Hicks, 539 U.S. 113 (2003); Nike, Inc. v. Kasky, 539 U.S. 654 (2003); Virginia v. Black, 538 U.S. 343 (2003); Erie v. Pap's A.M., 529 U.S. 277 (2000); United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000).

discrimination against the art form. This Court has never addressed this particular issue, and the trial court concluded the latter. The result of the trial court's opinion is continuing harm to fundamental constitutional rights. This outcome burdens and damages not only Humphries and countless other tattooists and customers in Virginia and elsewhere, but also other citizens wishing to engage in forms of self-expression that local politicians may not favor. The trial court's opinion and the authority upon which it relied constitute dangerous precedent for localities to follow. Because there is a well-developed and thoroughly briefed lower court record, this case provides a good vehicle for issuing a defining and culturally significant opinion. To be sure, this is a legal battle that will rage on until this Court settles the debate.

As Humphries argued in the Virginia courts, tattooing is an ancient art form that has seen a resurgence in popularity in the United States in the past couple of decades. Like any other art form, it is entitled to First Amendment protection. Instead, however, its practitioners and those who wish to have the art form practiced upon their bodies have been subjected to a burdensome zoning scheme in the City of Chesapeake that cannot be justified. Not one witness who testified in the trial court could explain any need for the highly restrictive zoning involved in this case.

Facially, the subject zoning scheme discriminates against tattooing by imposing unjustifiably burdensome zoning requirements, while similar personal services are allowed as a matter of right in almost all areas of the City, and without the need for

a "conditional use permit". As applied, Humphries presented evidence of selective enforcement, to which the City had no answer or explanation.

B. Free Speech/Expression Issues

For purposes of this appeal and the City's zoning ordinance, intradermal micropigmentation and tattooing are indistinguishable; therefore, the Constitutional analysis is identical and Humphries has proper standing to challenge the subject ordinances on free speech and expression grounds. Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973). See also Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987).

There is currently a significant and long-standing split of authority in American jurisprudence regarding whether tattooing is an activity sufficiently imbued with communicative aspects to justify free speech and expression protection under the First Amendment to the Constitution. Logically, it is difficult to conceive of any reason why tattooing should be considered any differently from any other type of "art". Tattooing is an "art form" recognized both nationally and internationally. Lanphear v. Commonwealth of Massachusetts, Mass. Superior Court Slip Opinion 99-1896-B (October 20, 2000), aff'd by Commonwealth v. Lanphear, 50 Mass. App. Ct. 1107, 737 N.E.2d 1281 (2000); Virginia Board of Health Professions Report (January 3, 1994).[3] "Persons obtain tattoos to demonstrate commitment to other persons, to institutions, to religious beliefs, and to political and personal beliefs." Lanphear, p. 3. Many people -- men

[3] A copy of this report to the Virginia General Assembly is in the record as Exhibit B to Humphries' Bill of Particulars.

and women, middle-class professionals and otherwise -- seek tattoos "as an expression of individuality." Report, p. 12.

In Lanphear, the Superior Court of Massachusetts declared that a Massachusetts statute prohibiting tattooing by anyone other than a licensed physician was an unconstitutional infringement on the right to freedom of expression. See also Commonwealth v. Meuse, 1999 Mass. Super. Lexis 470, 10 Mass. L. Rep. 661 (Mass. Super. Ct. 1999) (dismissing criminal indictment of violation of tattoo statute because statute requiring tattooing by a qualified physician was unconstitutional).

In MacNeil v. Board of Appeal of Boston, 2004 Mass. Super. LEXIS 282, 18 Mass. L. Rep. 153 (Mass. Super. Ct. 2004), the court analyzed amendments to the Boston zoning code authorizing tattoo parlors pursuant to a conditional use permit scheme. In that case, the court rejected the notion that "merely speculative factual grounds" can justify regulations restricting free speech and expression rights, and refused to accept unsupported conclusions supposedly justifying the enactment. Id., 18 Mass. L. Rep. at 155 (internal citations omitted). The court went on to find that there was "insufficient evidence that the City and Zoning Commission's conditional use designation was designed to serve any substantial governmental interest and for that reason, the body art establishment ordinance...is unconstitutional." Id.

The trial court in this case rejected the free speech and expression arguments advanced by Humphries, and in comparing competing authority

submitted by the parties, appeared to rely primarily on State v. White, 348 S.C. 532, 560 S.E.2d 420 (2002).[4] The trial court also found support for its decision in Stephenson v. Davenport, 110 F.3d 1303, 1307, n. 4 (8th Cir. 1997), State ex. rel. Medical Licensing Bd. v. Brady, 492 N.E.2d 34 (Ind. Ct. App. 1986), Yurkew v. Sinclair, 495 F. Supp. 1248, 1254 (D. Minn. 1980), and People v. O'Sullivan, 96 Misc. 2d 52, 53 (N.Y. Misc. 1978). The analysis of the trial court and other courts which have denied free speech and expression protection for tattooing have made rulings that simply cannot be reconciled with this Court's jurisprudence, which has made it clear that many non-verbal, communicative and/or expressive activities are entitled to protection. See, e.g., Texas v. Johnson, 491 U.S. 397, 109 S. Ct. 2533, 105 L.E.2d 342 (1989) (the burning of an American flag is "speech" entitled to First Amendment protection); Spence v. Washington, 418 U.S. 405, 94 S. Ct. 2727, 41 L.Ed.2d 842 (1974) (the display of an American flag to which a peace symbol had been sewn is afforded First Amendment protection); Smith v. Goguen, 415 U.S. 566, 94 S. Ct. 1242, 39 L.Ed.2d 605 (1974) (wearing a small American flag sewn to the seat of one's pants is protected expressive conduct); Tinker v. Des Moines School District, 393 U.S. 503, 89 S. Ct. 733, 21 L.Ed.2d 731 (1969) (wearing a black armband by students to protest American

[4] This opinion from a sharply divided South Carolina Supreme Court has been the object of a great deal of criticism. See, e.g., Anthony Jude Picchione, Tat-too Bad for Municipalities: Unconstitutional Zoning of Body-Art Establishments, 84 B.U.L. Rev. 829 (June, 2004); Bobby G. Frederick, Tattoos and the First Amendment - Art Should Be Protected As Art: The South Carolina Supreme Court Upholds the State's Ban on Tattooing, 55 S.C. L. Rev. 231 (Fall, 2003).

involvement in Vietnam is "speech"); Brown v. Louisiana, 383 U.S. 131, 86 S. Ct. 719, 15 L.Ed.2d 637 (1966) (the act of conducting a sit-in by African American students at a segregated "whites only" library is protected "speech"); and Stromberg v. California, 283 U.S. 359, 51 S. Ct. 532, 75 L.Ed. 1117 (1931) (display of a red flag in support of communism is speech). See also, Bery v. City of New York, 97 F.3d 689 (2d Cir. 1996) (invalidating, on free speech and equal protection grounds, a licensing requirement imposed on artists desiring to sell artwork in public spaces). There is no principled distinction to be made between the above-described expressive activities and the art of tattooing, and, in fact, the permanent nature of tattoos makes the chosen statement or expression potentially much more significant than, for example, the temporary wearing of an arm band or the quick destruction of a flag via a burning.

C. Equal Protection and Due Process

Facially, the zoning denies equal protection and due process rights because it singles out a particular form of expressive activity and subjects it to a burdensome zoning scheme, without any justification whatsoever. This is a continuing effort by the City to discriminate against a particular activity and clientele, and Gene Waters, a former member of the Chesapeake City Council, testified without objection or rebuttal to the blatant admissions of intentional discrimination he heard from fellow Council members as the zoning was created. (TR 48-57).[5]

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[5] The September 1, 2005 trial transcript is in the record.

As applied specifically to Humphries, the subject zoning has not only ensnared her in the City's effort to hinder the opening of "tattoo parlors", but she has also suffered selective prosecution. (TR 30-41).

As this Court made crystal clear in a per curiam opinion, the equal protection clause of the United States Constitution recognizes a so-called "class of one" claim where a plaintiff alleges that "she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (internal citations omitted). This is exactly what the trial court record in this case reveals, and it is exactly what Humphries argued to the trial court at the conclusion of the evidence. (TR 170-71).

"The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." Village of Willowbrook, 528 U.S. at 564 (internal citations omitted).

Although there is some precedent in Virginia law for invalidating zoning classifications and decisions on equal protection and due process grounds (see, e.g., Board of Supervisors v. Carper, 200 Va. 653, 107 S.E.2d 390 (1959)), there has been little guidance from this Court regarding the extent to which such constitutional principles apply to such and how lower courts ought to judge them. In fact, Justice Breyer's concurrence in Village of Willowbrook, Id. at 565, was

careful to "minimize any concern about transferring run-of-the-mill zoning cases into cases of constitutional right." See also Schad v. Mount Ephraim, 452 U.S. 61, n. 4 (1981) (declining to address similar due process and equal protection arguments and, instead, sustaining appellant's First Amendment challenge to a zoning scheme). Humphries urges this Court to take this opportunity to clarify the due process and equal protection analysis to be employed in zoning disputes, and respectfully submits that the City's irrational campaign against the art of tattooing makes this zoning battle anything but "run-of-the-mill." Simply stated, there must be a constitutional solution to the type of governmental oppression and admitted discrimination involved here.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted
LASTING BEAUTY, LLC
and DENISE HUMPHRIES

By: /s/ Kevin E. Martingayle
Of Counsel

Kevin E. Martingayle (VSB No. 33865)
STALLINGS & BISCHOFF, P.C.
2101 Parks Avenue, Suite 801
Post Office Box 1687
Virginia Beach, Virginia 23451
(757) 422-4700 (Telephone)
(757) 428-6982 (Facsimile)

April 19, 2007

TABLE OF CONTENTS
Appendix to Petition

Page

Order of
The Supreme Court of Virginia
Re: Refusing Petition for Appeal
entered October 25, 2006 ..... App. 1

Memorandum Opinion of
The Circuit Court for the City of Chesapeake
entered March 23, 2006 ..... App. 2

Order of
The Supreme Court of Virginia
Re: Denying Petition for Rehearing
entered January 19, 2007 ..... App. 16

Judgment and Final Order of
The Circuit Court for the City of Chesapeake
Re: Refusing Petition for Appeal
entered May 3, 2006 ..... App. 17

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday *the* 25th *day of* October, 2006.

Lasting Beauty, L.L.C., et al., Appellants,

against Record No. 061586
Circuit Court No. CH04-626

City of Chesapeake, et al., Appellees.

[Entered: October 25, 2006]

From the Circuit Court of the City of Chesapeake

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: /s/
Deputy Clerk

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF CHESAPEAKE

THE CITY OF CHESAPEAKE,
A Municipal Corporation, and
JAMES T. DAVIS, CZA, Zoning
Administrator,

Plaintiffs

v. Chancery No. 04-626

LASTING BEAUTY, L.L.C., and
DENISE HUMPHRIES,

Defendants

MEMORANDUM OPINION

On June 21, 2004, the City of Chesapeake ("the City") and James T. Davis, Zoning Administrator ("Davis") (collectively "plaintiffs") filed a Bill of Complaint seeking declaratory judgment and a permanent injunction against Lasting Beauty, L.L.C. ("Lasting Beauty") and Denise Humphries ("Humphries") (collectively "defendants") for their alleged violation of section 7-602 of the Chesapeake Zoning Ordinance.

On June 24, 2004, the defendants filed a demurrer and answer and cross-bill, which alleged that the zoning scheme relevant to tattoo parlors and permanent makeup establishments be declared invalid. Defendants also filed a Bill of Particulars, which alleged that Chesapeake's zoning scheme relating to tattooing/intradermal micropigmentation (1) violates the Dillon Rule; (2) is not rationally related to a proper government

purpose and fails to meet the "fairly debatable" standard; (3) unconstitutionally burdens free speech and expression rights guaranteed by the United States and Virginia Constitutions; (4) denies equal protection and due process rights guaranteed by the United States and Virginia Constitutions; and (5) constitutes an illegal attempt by the plaintiffs to avoid the impact of a prior final order of this tribunal striking down the former ban on tattooing.[1]

The plaintiffs filed a motion to strike the defendants' answer and cross-bill. By an agreed Order, dated May 12, 2005, both the defendants' and plaintiffs' demurrers were overruled. At trial, the parties stipulated that Lasting Beauty operated in a B-2 zoning district and practiced intradermal micropigmentation, which constituted tattooing under the relevant zoning ordinance. The parties agreed that the burden shifted to the defendants, and they proceeded with their case. At the end of the defendants' case, the plaintiffs moved to strike the evidence. The Court took the motion under advisement.

FINDINGS OF FACT

The evidence at trial established the following. Humphries operates a business, Lasting Beauty, located at 445 Battlefield Boulevard, Suite Q,

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[1] Lasting Beauty filed an appeal from a decision of the Chesapeake Board of Zoning Appeals denying Lasting Beauty's appeal of the violation letter issued to it on May 21,2003. By Consent Order, dated May 5, 2005, this Court dismissed Lasting Beauty's appeal (CH04-26), but reserved to Lasting Beauty the right to raise and pursue all claims and arguments therein presented in this case.

Chesapeake, Virginia 23320, that specializes in the application of permanent makeup, also known as micropigmentation. Lasting Beauty is located within a B-2 zoning district. Section 7-602 of the Chesapeake Zoning Ordinance does not permit the operation of a tattoo parlor in the B-2 zoning district. Section 3-403 of the Chesapeake Zoning Ordinance defines tattoo parlor to include permanent makeup services.

On June 20, 2001, the City Council enacted an ordinance, which amended section 8-602 of the Chesapeake Zoning Ordinance, permitting tattoo parlors, including permanent makeup establishments, to operate in the M-l and M-2 ("industrial") districts within the City of Chesapeake. The Council did so in response to discovering that the previous ban on tattoo parlors within the City of Chesapeake was not legal. The evidence established that at the meeting on the proposed ordinance, most of the City Council members expressed opinions that tattoo parlors should be banned. Additionally, Council members were not presented with any evidence on the safety concerns of tattooing when they decided to enact the ordinance allowing the parlors to operate only in industrial districts.

Evidence at trial established that since the relevant ordinance concerning tattoo parlors was enacted, at least one conditional use permit has been granted to a tattoo parlor named Wally's American Pie Tattoo Company. Additionally, another business named Holly's Hair Nails and More, operates in a B-2 district within the City of

Chesapeake that applies permanent makeup. Although known to the City, the City has not sought to bring an action against her such as it has with defendants.

Evidence established that the clientele of Lasting Beauty consists of women, generally 45 to 80 years of age, who have an average annual income of $50,000 or more. Additionally, defendants presented evidence that individuals who receive tattoos today differ from the perception of past recipients and involve a greater diversity of individuals. Finally, the evidence established that there are 501.97 acres in the Greenbrier area alone, and over 3,500 acres in the entire City, that are zoned consistent with defendants' requested use.

ANALYSIS

Defendants' first argument is that the zoning scheme is invalid because it violates the Dillon Rule. This is so, defendants argue, because the City has not been given the authority to ban the operation of tattoo parlors. Defendants rely on this Court's June 5, 2001 ruling that section 15.2-912 does not permit localities to completely ban tattoo parlors. Defendants contend that the current zoning scheme acts as a *de facto* ban of tattoo parlors within the City, exceeding the authority granted to the City by § 15.2-912. In response, the plaintiffs argue that the City's authority to zone tattoo parlors is granted in Code §§ 2280 - 2286, and the zoning ordinance at issue was not enacted pursuant to Code § 15.2-912.

The Dillon Rule provides that "municipal governments have only those powers which are

expressly granted by the state legislature, those powers fairly or necessarily implied from expressly granted powers, and those powers which are essential and indispensable." *City of Virginia Beach* v. *Hay*, 258 Va. 217, 221, 518 S.E.2d 314, 316 (1999) (*citing Commonwealth* v. *County Board of Arlington County*, 217 Va. 558, 574, 232 S.E.2d s30, 40 (1977)). The General Assembly has granted authority to localities to enact zoning regulations. VA. CODE ANN. §§ 15.2-2280 - 2286. Additionally, localities possess the authority to "regulate the sanitary condition of the personnel, equipment and premises of tattoo parlors . . .." VA. CODE ANN. § 15.2-912. On June 5, 2001, however, this Court ruled that Code § 15.2-912 does not give localities the authority to ban tattoo parlors. (Exhibit D-5.)

The operation of tattoo parlors, for conditional use, is permitted in Chesapeake within those districts zoned industrial. Chesapeake Zoning Ordinance, § 8-602. The evidence at trial was that over 3,500 acres of land is zoned consistent with defendants' requested use. The Greenbrier area of Chesapeake alone contains 501.97 acres so zoned. At trial, Humphries admitted that the Greenbrier area, with the traffic that other businesses bring, could be good for business. Additionally, on June 16, 2002, the Council approved a conditional use permit for a tattoo parlor to operate within the City. Accordingly, the evidence does not support the defendants' claim that the current zoning scheme constitutes a *de facto* ban on tattoo parlors within

the City of Chesapeake.[2] Finally, the defendants have not argued that the City has exceeded its authority under Code §§ 15.2-2280 - 2286. Therefore, the Court finds that the current zoning scheme regarding tattoo parlors does not violate the Dillon Rule.

Defendants' next argument is that the subject zoning restrictions, facially and/or as applied, unconstitutionally burden free speech and expression rights guaranteed by the United States and Virginia Constitutions. Defendants maintain that tattooing is an art form entitled to the protections of the First Amendment to the United States Constitution, as well as similar protections from the Virginia Constitution. Defendants argue that the City must prove that there are "no less restrictive ways to accomplish any legitimate goals or purposes the City is able to articulate." Defendants' Bill of Particulars, ^ | 2.

Under the United States Supreme Court's First Amendment analysis, conduct constitutes protected speech if it is "sufficiently imbued with elements of communication." *Spence v. Washington,* 418 U.S. 405, 409 (1974). The question, then, is whether the act of applying permanent makeup, or tattoos, is sufficiently communicative such that it falls within the protection of the First and Fourteenth

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[2] This conclusion also dispenses with the defendants' claim that the zoning scheme was enacted in an attempt to avoid the impact of this Court's order striking down the former ban on tattoo parlors.

Amendments. *See Yurkew* v. *Sinclair*, 495 F. Supp. 1248, 1254 (D. Minn. 1980).

Neither the United States Supreme Court, nor the Supreme Court of Virginia has addressed this issue. Of the few courts that have, the majority of them have concluded that the act of tattooing cannot be considered speech under the First Amendment. *See State* v. *White*, 560 S.E.2d 420, 423, 348 S.C. 532, 537 (2002) (holding the appellant had not made any showing that the process of tattooing is communicative enough to automatically fall within First Amendment protection); *Yurkew*, 495 F. Supp, at 1253 (concluding that the process of tattooing was not protected speech under the First Amendment); *State ex rel. Medical Licensing Bd. v. Brady*, 492 N.E.2d 34 (Ind. Ct. App. 1986) (same); *People* v. *O'Sullivan*, 96 Misc. 2d 52, 53 (N.Y. Misc. 1978) (same). Moreover, the United States Court of Appeals for the Eighth Circuit has held that when a tattoo is intended only as a form of self-expression, not intending to convey a particularized message, it is not protected speech under the First Amendment. *Stephenson v. Davenport*, 110 F.3d 1303, 1307, n.4 (8th Cir. 1997).

Defendants direct the Court's attention to one unpublished opinion by the Superior Court of Suffolk County, Massachusetts, which concluded that the act of tattooing was expression protected by the First Amendment of the United States Constitution. *Lanphear* v. *Commonwealth of Massachusetts*, Mass. Superior Court Slip Opinion 99-1896-B (October 20, 2000), aff'd *Commonwealth* v. *Lanphear*, 50 Mass. App. Ct. 1107, 737 N.E.2d

1281 (2000). The Massachusetts court did not find *Yurkew* and *Stephenson* persuasive, concluding that those cases simply decided, without analysis, that tattooing did not constitute conduct protected under the First Amendment. *See id.*

This court has the benefit of the analysis conducted by the Supreme Court of South Carolina, however, which the Massachusetts court did not have when it decided *Lanphear.* The South Carolina Court recognized that a general presumption of validity attaches to legislative acts when subjected to a constitutional attack. *White*, 560 S.E.2d at 422, 348 S.C. at 536. Virginia precedent establishes the same presumption. *Wilkins* v. *West*, 264 Va. 447, 462, 571 S.E.2d 100, 108 (2002). Unless the legislation is clearly shown to violate a constitutional provision, it will be upheld. *Id.* Accordingly, defendants have the burden of showing that the instant zoning scheme clearly violates a constitutional provision.

The only evidence offered by defendants attempting to show that the zoning scheme violated the provisions of the First Amendment was Humphries' testimony that she considers a tattoo a form of expression and considers herself an artist. Defendant's subjective belief, however, is not sufficient to overcome the presumption of validity. Defendants were required to show how the act of tattooing or applying permanent makeup is intended to convey a particularized message and whether there is likelihood that the message would be understood by those who viewed it. *See White*, 560 S.E.2d at 423, 348 S.C. at 537 (citing *Texas v. Johnson*, 491 U.S. 397, 404 (1989)). Here, as in

White, the defendants have not shown how the act of injecting dye to create the tattoo, or permanent makeup, is sufficiently communicative in nature to warrant protection under the First Amendment.

Defendants also argue, however, that the zoning scheme, relative to tattoo parlors and permanent makeup establishments, is not even rationally related to a proper governmental purpose, and therefore fails to meet the 'fairly debatable' standard. Defendants' Bill of Particulars, ¶ 1. Both in their pleadings and at trial, the defendants argued that because they had challenged the reasoning behind and authority for the subject zoning scheme, it was incumbent upon the City to come forward with evidence to support the need and basis for the regulations.

Defendants' attempt to place the burden on the City to prove that the zoning scheme is rationally related to a legitimate government interest is in error. The standard for judicial review of the validity of zoning ordinances is well settled. *Board of County Supervisors* v. *The Southland Corporation*, 224 Va. 514, 522, 297 S.E.2d 718, 722 (1982). The action of a local governing body in "enacting or amending its zoning ordinance is presumed to be valid." *Id.* Where a party challenges the presumptive reasonableness of a zoning ordinance with "probative evidence of unreasonableness, the ordinance cannot be sustained unless the governing body meets the challenge with some evidence of reasonableness." *Id.* If the governing body supplies evidence of reasonableness "sufficient to make the question 'fairly debatable,' the ordinance must be

sustained." *Id.* at 522-23, 297 S.E.2d at 722 (citing *Fairfax County* v. *Snell Corp.*, 214 Va. 655, 202 S.E.2d 889 (1974) and *Board of Supervisors* v. *Carper*, 200 Va. 653, 107 S.E.2d 390 (1959)).

Defendants presented evidence, in the form of testimony from a former City Council member, that at the time the provisions of the zoning scheme regarding tattoo parlors were enacted, a number of the Council members expressed opinions showing bias against tattoo parlors and that the Council members did not think they should be allowed at all in the City. The former Council member also testified that in his opinion, the decision not to allow tattoo parlors in retail areas was politically motivated. He further testified that there was no evidence or information presented to the Council that tattoos are unsafe.

This evidence, however, falls short of probative evidence of unreasonableness. First, in considering whether a legislative act is reasonable, generally the motives of the governing body in undertaking the act are immaterial. *Helmick v. Town of Warrenton*, 254 Va. 225, 231, 492 S.E.2d 113 (1997). Accordingly, whether the Council members thought that tattoo parlors should be allowed in the City is immaterial, particularly in light of the Court's ruling above that the extant zoning scheme is not a *de facto* ban of tattoo parlors within the City. Secondly, merely because the Council did not receive information that tattoos are unsafe is not relevant to whether permitting tattoo parlors to operate only in industrial districts is unreasonable.

At most, defendant Humphries presented her own testimony that she desired to operate her business in its present location, along with her opinion that the zoning scheme was unreasonable. Although the City did not supply any evidence of reasonableness at trial, the burden rested on the defendants to supply probative evidence of unreasonableness. The defendants simply did not meet their burden. Accordingly, the presumption of validity given to the zoning ordinance remains intact.

The same analysis is applicable to the defendants' argument that the zoning scheme at issue denies them equal protection and due process rights. Defendants argue that the "zoning scheme is much more burdensome on them than the majority of the rest of the zoning scheme is on similarly-situated businesses and providers of services." Defendants' Bill of Particulars, f 3. Defendants also failed to meet their burden on this issue.

The classifications of the relevant zoning scheme are not inherently suspect and, as discussed above, do not infringe upon the exercise of a fundamental right. Accordingly, the classifications at issue are "permissible if the governmental objective is legitimate and the classifications bear a reasonable or substantial relation thereto." *Estes Funeral Home* v. *Adkins*, 266 Va. 297, 304, 586 S.E.2d 162, 165 (2003) (internal quotations and citations omitted). The classifications carry with them the same presumptions and burdens as an ordinance itself

and are presumed to be valid. *Id.* at 304, 586 S.E.2d at 165-55.

Accordingly, defendants must produce probative evidence that the classification of which they complain is discriminatory and not rationally related to a legitimate government purpose. *Board of Supervisors v. Rowe*, 216 Va. 128, 135, 216 S.E.2d 199, 206 (1975). As discussed above, however, defendants offered little more than their opinion that there can be no legitimate government interest for limiting tattoo parlors and permanent makeup establishments to industrial areas. Moreover, defendants have not shown that the zoning scheme treats similarly-situated businesses differently. The zoning scheme does not allow any business supplying tattoos or permanent makeup to operate outside of an industrial district.

Defendants' arguments that the City is selectively enforcing the subject zoning scheme, ignoring other similarly-situated businesses that are operating in violation of the zoning ordinances, does not save their equal protection claim. Defendants' contention on this point is that defendants have been singled out and given an undue amount of attention, and that selective enforcement violates both equal protection and due process rights. The most evidence that defendants presented at trial on this issue established that another business operates within the City of Chesapeake that applies permanent makeup, and, although known to the City, it has not sought to bring an action against her such as with defendants here.

To succeed on a selective-prosecution claim, the defendants must "demonstrate that the prosecutor's decision 'was based on an unconstitutional motive.'" *Boyd v. County of Henrico*, 42 Va. App. 495, 522, 592 S.E.2d 768, 781 (2004) (citing *Rowsey v. Lee*, 327 F.3d 335, 343 (4th Cir. 2003)). The prosecution must be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, 'including the exercise of protected statutory and constitutional rights." *Id.* (citation omitted). Defendants have not supplied any evidence that the "undue attention" they claim they have received from the City has been deliberately based on an unjustifiable standard. Accordingly, to the extent that defendants argue that the City has selectively enforced the extant zoning scheme, their argument fails.

CONCLUSION

For the foregoing reasons, the Court will grant the plaintiffs' motion to strike the defendants' evidence. Additionally, the Court finds that defendants are in violation of section 7-602 of the Chesapeake Zoning Ordinance, and the City's prayer for an injunction permanently enjoining the defendants from providing permanent makeup services at 445 Battlefield Boulevard, Suite Q, Chesapeake, Virginia, 23320 should be granted. The Office of the City Attorney is hereby directed to draft an order in accordance with this Memorandum Opinion and circulate it for counsel's endorsements.

The Clerk is hereby directed to send a certified copy of this Memorandum Opinion to all counsel of record.

Entered: [March 23, 2006]

/s/
Circuit Court Judge

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 19th *day of* January, 2007.

Lasting Beauty, L.L.C., et al., Appellants,

against Record No. 061586
Circuit Court No. CH04-626

City of Chesapeake, et al., Appellees.

[Entered: January 19, 2007]

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside the judgment rendered herein on the 25th day of October, 2006 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: original order signed by a deputy clerk of the Supreme Court of Virginia at the direction of the Court

Deputy Clerk

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

THE CITY OF CHESAPEAKE,
A Municipal Corporation,

and

JAMES T. DAVIS, CZA,
Zoning Administrator,

Plaintiffs,

v. IN CHANCERY NO.: CH04-626

LASTING BEAUTY, L.L.C.

and

DENISE HUMPHRIES,

Defendants.

JUDGMENT AND FINAL ORDER

In accordance with the Court's memorandum opinion dated March 23, 2006, the Court grants the Plaintiffs' motion to strike the Defendants' evidence introduced in support of the Defendants' Cross Bill and will grant the Plaintiffs' prayer for a permanent injunction. Therefore, the Court ORDERS that the Defendants' Cross Bill is dismissed and ORDERS that the Defendants are perpetually enjoined from providing permanent makeup services at 445 Battlefield Boulevard, Suite Q, Chesapeake, Virginia 23320. However, by agreement, the injunction granted herein is stayed pending exhaustion of Defendants' appeal rights.

Entered: [May 3, 2006]

/s/
Circuit Court Judge

ASKED FOR REGARDING THE RULING RESULT, AND OBJECTED TO REGARDING THE COURT'S DETERMINATION THAT NO EVIDENCE WAS OFFERED AT TRIAL OF THE REASONABLENESS OF THE ORDINANCE REGULATING THE LOCATION OF TATTOO PARLORS. EVIDENCE WAS OFFERED AND ACCEPTED BY THE COURT THAT 501.97 ACRES IN THE GREENBRIER AREA AND OVER 3,500 ACRES IN THE ENTIRE CITY ARE ZONED FOR THE OPERATION OF A TATTOO PARLOR. THIS EVIDENCE CONSTITUTES REASONABLENESS UNDER THE "FAIRLY DEBATABLE" STANDARD.

/s/
Grady A. Palmer, Esq.
Office of the City Attorney
306 Cedar Road
Chesapeake, VA 23322
(757) 382-6586
(757) 382-8749 (facsimile)

Counsel for City of Chesapeake,
James T. Davis, CZA, Zoning Administrator

SEEN AND OBJECTED TO IN ACCORDANCE WITH MATERIALS FILED WITH THE COURT, EVIDENCE PRESENTED, AND ARGUMENTS MADE ON THE RECORD. ALSO OBJECTED TO ON THESE GROUNDS: 1) THE TRIAL COURT ERRED IN FINDING THAT HUMPHRIES MADE

ANY SORT OF MEANINGFUL ADMISSION RELATING TO THE ARGUMENT THAT THE ZONING SCHEME OPERATES AS A DE FACTO OR QUASI-BAN; 2) THE TRIAL COURT ERRED IN ITS INTERPRETATION OF DEFENDANTS' DILLON RULE ARGUMENTS AND EVIDENCE; 3) THE TRIAL COURT ERRED BY REJECTING DEFENDANTS' UNREBUTTED EVIDENCE AND APPLYING THE WRONG LEGAL STANDARD ON A MOTION TO STRIKE.

/s/

Kevin E. Martingayle, Esq.
Stallings & Bischoff, P.C.
2101 Parks Avenue, Suite 801
Virginia Beach, VA 23451
(757) 416-6009
(757) 428-6982 (facsimile)

Counsel for Lasting Beauty, L.L.C.
and Denise Humphries

No. 06-1374

FILED
MAY 16 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court of the United States

LASTING BEAUTY, L.L.C. and DENISE HUMPHRIES,

Petitioners,

v.

CITY OF CHESAPEAKE and JAMES T. DAVIS, CZA, Zoning Administrator,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Ronald S. Hallman
Counsel of Record
Grady A. Palmer
OFFICE OF THE CITY ATTORNEY
306 Cedar Road
Chesapeake, Virginia 23322
(757) 382-6586

Counsel for Respondents

THE LEX GROUP^{DC} ♦ 1750 K Street N.W. ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦ www.thelexgroupdc.com

QUESTIONS PRESENTED

1. Did the courts below err in failing to determine that the subject city zoning scheme governing tattooing unconstitutionally burdens free speech and expression rights guaranteed by the United States Constitution?

2. Did the courts below err in failing to determine that the subject city zoning scheme facially and as applied denies equal protection and due process rights guaranteed by the United States Constitution?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT 1

ARGUMENT 6

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

CASES

Asarco, Inc, et al. v Kadish, et al.,
490 U.S. 605 (1989).....6

Board of Zoning Appeals v.
University Square Assocs.,
246 Va. 290, 435 S.E.2d 385 (1993) 4

Secretary of State of Md. v. Munson,
467 U.S. 947 (1984).....7, 8

South Carolina v. White,
348 S.C. 532, 560 S.E.2d 420 (2002) 9, 10

Village of Willowbrook v. Olech,
528 U.S. 562 (2000).....11

Virginia v. Hicks,
539 U.S. 113 (2003).....6

White v. South Carolina,
537 U.S. 825 (2002).....10

Young v. American Mini Theatres,
427 U.S. 50 (1976).....10, 11

Yurkew v. Sinclair,
495 F. Supp. 1248 (D. Minn. 1980) 9

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. I ..... *passim*

U.S. CONST. amend. XIV 1, 4, 5

U.S. CONST. art. III 7

STATUTES

28 U.S.C. §1257 1

Va. Code §15.2-912 3

Va. Code §15.2-2312 4

Va. Code tit. 54.1 3

RULES

Fed. R. Civ. P. 12(b)(6) 11

Former Va. Sup. Ct. R. 2:13 4

ORDINANCES

CHESAPEAKE VA. CITY CODE §38-201 3

CHESAPEAKE VA. CITY CODE §38-202 3

CHESAPEAKE VA. CITY CODE §38-203 3

CHESAPEAKE VA. CITY CODE §38-204 3

CHESAPEAKE VA. CITY CODE §38-205 3

CHESAPEAKE VA. CITY CODE §38-206 3

CHESAPEAKE VA. CITY CODE §38-207 3

CHESAPEAKE VA. CITY CODE §38-208 3

CHESAPEAKE VA. CITY CODE §38-209 3

CHESAPEAKE VA. CITY CODE §38-210 3

CHESAPEAKE VA. CITY CODE §38-211 3

CHESAPEAKE VA. CITY CODE §38-212 3

CHESAPEAKE VA. CITY CODE §38-213 3

CHESAPEAKE VA. ZONING ORDINANCE §3-301.....2

CHESAPEAKE VA. ZONING ORDINANCE §3-302.....2

CHESAPEAKE VA. ZONING ORDINANCE §3-403.....2

CHESAPEAKE VA. ZONING ORDINANCE §8-601.C.27 2

CHESAPEAKE VA. ZONING ORDINANCE §8-602.....2

06-1374

BRIEF IN OPPOSITION FOR THE RESPONDENTS

OPINIONS BELOW

The Virginia Supreme Court's decisions to refuse the petition for appeal and to deny rehearing are not reported. The opinion of the Chesapeake Circuit Court is not reported.

JURISDICTION

The Virginia Supreme Court entered an order January 19, 2007 denying rehearing of a refused petition for appeal. The petitioners filed a petition for a writ of certiorari with this Court on April 16, 2007. The petition for writ of certiorari invokes this Court's jurisdiction under 28 U.S.C. §1257.

STATEMENT

The petitioners challenge the validity of a zoning ordinance enacted by the City of Chesapeake ("the City") that regulates the location of tattoo parlors. The trial court determined that the evidence offered by the petitioners did not demonstrate that the act of tattooing is sufficiently communicative to warrant First Amendment protection or that the zoning ordinance violates the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment. Pet. App. 2-15. The Virginia Supreme

Court denied a petition for appeal by finding that the trial court committed no reversible error.

1. The Chesapeake Zoning Ordinance provides that a tattoo parlor must be located in the M-1 or M-2 (Industrial) zoning districts[1] and must obtain a conditional use permit and meet a distance requirement of 1000 feet from any other tattoo parlor, private and public schools, day care facilities, public parks, religious institutions or any property zoned or used for residential purposes. *See* CHESAPEAKE VA. ZONING ORDINANCE §§8-601.C.27 and 8-602.[2] The definition of a tattoo parlor includes the activity referred to by the petitioners as intradermal micropigmentation ("permanent make-up"). *See* CHESAPEAKE VA. ZONING ORDINANCE §3-403. Tattoo parlors are prohibited in the B-2

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[1] M-1 and M-2 are primarily zoning districts for industrial land uses but permit a range of permitted uses from general industrial machinery to hardware stores and churches. M-1 and M-2 zoning districts can be found in many places within the City. See Plaintiffs' Exhibit 5. Of course, City Council retains the right to rezone land to M-1 or M-2 that could expand the areas in which a tattoo parlor could locate. A site specific rezoning to support an identified land use is not uncommon.

[2] The City of Chesapeake adopted an inclusive zoning ordinance. An inclusive zoning ordinance is one that specifically lists permitted and conditional use (uses that require a conditional use permit approved by the governing body) for each zoning district. All land uses not specifically listed and not substantially similar to a listed use are considered prohibited in that zoning district. *See* CHESAPEAKE VA. ZONING ORDINANCE §§3-301 and 3-302.

(General Business) zoning district[3] because the list of permitted and conditional uses does not include a reference to tattoo parlors. The zoning ordinance does not regulate the display of tattoos by individuals, the process by which a tattoo is created, or the design and form that a tattoo can take. It also does not regulate the operation of a lawful tattoo parlor.[4] The zoning ordinance only regulates the location at which a tattoo parlor can operate.

2. The petitioners operate a tattoo parlor limited to the practice of intradermal micropigmentation ("permanent makeup"). Pet. 3. There is no claim that the petitioners have performed or would perform any other form of tattooing.

3. In May of 2003, the City, through its Zoning Administrator, issued a notice of violation to the petitioners for operating a tattoo parlor in the B-2 zoning district. The petitioners appealed that notice of violation to the Chesapeake Board of Zoning Appeals ("the BZA"). The BZA approved the notice of violation by finding that the petitioners' business

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[3] The B-2 zoning district generally provides for the location of commercial land uses. Typical land uses are restaurants and retail stores.

[4] In accordance with Title 54.1 of the Code of Virginia, the Board for Barbers and Cosmetology regulates the tattoo parlor industry. In addition, Virginia Code §15.2-912 allows localities to regulate the sanitary condition of a tattoo parlor which the City of Chesapeake has done by enacting Chesapeake City Code sections 38-201 through 38-213.

constitutes a tattoo parlor and is located in the B-2 zoning district.[5]

4. After the BZA approved the notice of violation, the respondents filed their complaint with the Chesapeake Circuit Court seeking injunctive relief.[6] The petitioners filed a cross bill asserting rights under the Fourteenth Amendment, including free speech, due process and equal protection.[7] The trial court granted the respondents' request after finding that, based on the evidence at trial, the act of tattooing is not sufficiently communicative in nature to warrant protection under the First Amendment. Pet. App. 9-10.[8] The trial court noted that few courts have addressed the issue and, of those that have, the

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[5] In an appeal of a notice of violation, the BZA determines whether to "reverse or affirm, wholly or partly, or "modify an order, requirement, decision or determination appealed from." Virginia Code §15.2-2312.

[6] The petitioners filed an appeal of the BZA's decision with the Chesapeake Circuit Court but later dismissed it because Virginia law prohibited the petitioners from arguing that the zoning ordinance was unconstitutional or invalid in that procedural context. *See Board of Zoning Appeals v. University Square Assocs.*, 246 Va. 290, 435 S.E.2d 385 (1993).

[7] Former Virginia Supreme Court Rule 2:13 (rules for proceedings in equity) allowed a defendant to file a cross bill against a plaintiff. In this case, the petitioners sought relief in the cross bill by asking the trial court to declare the zoning ordinance invalid on grounds that it violates, among other things, the Fourteenth Amendment, including free speech, due process and equal protection.

[8] The final order entered by the trial court on May 3, 2006 granted the respondents' motion to strike the evidence offered in support of the petitioners' cross bill.

majority have concluded that the act of tattooing is not communicative in nature. Pet. App. 8-9. Since the trial court did not find evidence that the act of tattooing is sufficiently communicative it did not decide whether the zoning ordinance facially or as applied violated the First Amendment. In fact, the petitioners appear to have conceded an "as-applied" challenge by offering testimony characterizing micropigmentation; "we're not displaying hearts, or roses, or crosses, or anchors, it's replacing what nature has taken away for [sic] a woman as we age, or was never there to begin with." Tr. of Proceedings dated September 1, 2005 at 91. In addition, the trial court found that the respondents produced no evidence to establish that the zoning ordinance violates the Equal Protection and Due Process clauses of the Fourteenth Amendment. Pet. App. 12-14. The trial court found that the zoning ordinance does not establish classifications that are inherently suspect and, given its analysis of the First Amendment issue, the zoning ordinance does not infringe on a fundamental right. Pet. App. 12. Furthermore, the trial court found that the zoning ordinance does not create classifications on its face and the petitioners failed to produce any evidence that the zoning ordinance establishes a discriminatory classification. Pet. App. 13. The petitioners' Due Process claims also were not supported by any evidence. Pet. App. 13-14.

5. The petitioners sought review of the trial court's final order in the Virginia Supreme Court and was denied based on the court's judgment that that the record contained no reversible error. A motion for rehearing was also denied. Pet. App. 1 and 16.

ARGUMENT

The decisions by the Virginia Supreme Court to refuse the petition for appeal and motion to rehear are correct and do not conflict with a decision of this Court, a United States court of appeals or a state court of last resort. Therefore, this case does not warrant review by the United States Supreme Court.

1. The petitioners would not have standing at the federal trial court level and therefore cannot request relief from the United States Supreme Court by writ of certiorari to the Virginia Supreme Court on the First Amendment issues. While the petitioners were named as defendants at the trial court they were also plaintiffs. The petitioners responded to the respondents' bill of complaint for permanent injunction with a cross bill that requested the trial court to declare the zoning ordinance invalid based on, among other things, the purported constitutional rights raised in this petition. By challenging the zoning ordinance on a cross bill, the petitioners have placed themselves in the position of a plaintiff at the trial court level for purposes of evaluating whether they can now seek federal review of a state court decision on the issues raised in the cross bill. *See generally Virginia v. Hicks*, 539 U.S. 113 (2003) and *Asarco, Inc, et al. v Kadish, et al.*, 490 U.S. 605 (1989).

2. While it is true that the Court permits relaxed prudential limitations on standing in First Amendment cases, the petitioners do not appear to meet even the minimal standards outlined by this

Court in *Secretary of State of Md. v. Munson*, 467 U.S. 947 (1984). In *Munson*, a private fund raising company (Munson) challenged a Maryland statute that prohibited charitable organizations from paying expenses in an amount higher than 25% of the amount collected except in cases where a waiver of the limit applied. The Court opined that a litigant whose conduct is not protected by the First Amendment may challenge the facial validity of an overly-broad statute on appeal to this Court if the litigant satisfies Article III standing and "can be expected to frame the issues in the case." *Id.* at 958. The Court determined that Munson could assert the rights of charities because the fundraising activity "sought to be protected [was] at the heart of the business relationship between Munson" and the charities. *Id.* Furthermore, the Court found that "Munson's interests in challenging the statute are completely consistent with the First Amendment interest of the charities it represents." *Id.* The petitioners simply do not have the same relationship with other tattoo parlors as Munson had with charitable organizations.

The petitioners seek to challenge the validity of the zoning ordinance based on purported expressive conduct of other tattoo providers. Denise Humphries testified about permanent make-up that "we're not displaying hearts, or roses, or crosses, or anchors, it's replacing what nature has taken away for [sic] a woman as we age, or was never there to begin with." Tr. of Proceedings dated September 1, 2005 at 91. The petition is not clear on this point but it does not seem plausible for the petitioners to seek to raise the act of replacing a missing eyebrow or applying

permanent lip liner to the status of protected expressive conduct. Raising the purported rights of a tattoo provider who tattoos human skin to form letters, numbers or symbols seems to be the likely candidate for litigation on First Amendment issues and the object of this petition. While the respondents do not concede that any act of tattooing is sufficiently communicative to warrant First Amendment protection, to the extent that those tattoo providers could make such claims there is no good reason to allow the petitioners to litigate the issues on those parties' behalf.

There is simply no nexus between the petitioner and the purported First Amendment rights of other tattoo providers to expect the petitioners to satisfactorily frame the issues for those individuals. *See Munson* at 958. This explains why the trial court found little to no evidence to support the petitioners' First Amendment arguments. In fact, the petitioners appear to have a minimal understanding of the types of tattoos other tattoo providers may create by testifying that those individuals provide "...hearts, or roses, or crosses, or anchors..." Tr. of Proceedings dated September 1, 2005 at 91. The petitioners are not in a position to know the ins and outs of tattooing, other than permanent make-up, to articulate what qualities of the act of tattooing are expressive in nature and warrant protection under the First Amendment. Therefore, the petitioners should not be permitted on prudential grounds to challenge the zoning ordinance in this Court.

3. The Virginia Supreme Court correctly decided against hearing the merits of the petitioners' appeal

related to the constitutional issues. The central flaw of the petitioners' case is the near absence of any fact to support their constitutional arguments. Simply put, there is no evidence that a provider of permanent make-up or any other tattoo provider engages in expressive conduct. The trial court could not find that "the act of tattooing or applying permanent make up is intended to convey a particularized message and whether there is likelihood that the message would be understood by those who viewed it". Pet. App 9. By filing this petition, the petitioners ask this Court to divine that the act of tattooing in a tattoo parlor is imbued with communicative qualities sufficient to warrant First Amendment protection. There is simply no authority, besides an unreported opinion from a Massachusetts trial court, for the proposition that the act of tattooing another's skin constitutes expressive conduct protected by the First Amendment. On the contrary, well reasoned opinions from a state court of last resort and a federal district court conclude that the act of tattooing is not sufficiently communicative to warrant First Amendment protections. *See Yurkew v. Sinclair*, F. Supp 1248 (1980) and *South Carolina v. White*, 348 S.C. 532, 560 S.E.2d 420 (2002). Even if the act of tattooing another's skin could constitute expressive conduct, this case fails to put that issue squarely before this Court.

4. The petitioners claim that there is a "significant and long-standing split in American jurisprudence regarding whether tattooing is an activity sufficiently imbued with communicative aspects to justify free speech and expression protection under

the First Amendment to the Constitution". Pet. 7. Hyperbole aside, the petitioners have not cited an opinion by a state court of last resort or a United States circuit court that conflicts with the decision by the Virginia Supreme Court in this case. This Court recently denied a petition for writ of certiorari to the South Carolina Supreme Court to review that court's analysis of a claim by a tattoo provider that tattooing is expressive conduct protected by the First Amendment.[9] The South Carolina Supreme Court opinion did not conflict with any opinion of this Court, any opinion of a state court of last resort or any opinion of a United States court of appeal. Nothing has changed since 2002 to warrant further review. Furthermore, the dearth of cases involving tattoo parlors and tattoo providers indicates that the issue is not an important question of federal law that should be settled by this Court.

5. The petitioners' equal protection and due process claims do not have merit. Unlike adult business ordinances, the zoning ordinance does not create classifications between the same land uses. In *Young v. American Mini Theatres*, the Court found that the zoning ordinance adopted by the City of Detroit differentiated between motion picture theatres by the types of movies exhibited. *Young v. American Mini Theatres*, 427 U.S. 50 (1976). Theatres that exhibited sexually explicit movies were subject to standards different from those that did not. *See*

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[9] *White v. South Carolina*, 537 U.S. 825 (2002). South Carolina enacted a criminal law that prohibited tattooing except by a licensed physician for cosmetic or reconstructive purposes. *See South Carolina v. White*, 348 S.C. 532, 534, 560 S.E.2d 420, 421 (2002).

Young at 52. In contrast, all tattoo parlors in Chesapeake are subject to the same regulations in the zoning ordinance. Pet. App. 13. Since the zoning ordinance does not create any classification, an equal protect claim on this issue fails. Likewise, the petitioners' claim of selective enforcement, i.e. "class of one claim", was not supported by the evidence. Pet. App. 14.[10]

CONCLUSION

The petition for writ of certiorari to the Virginia Supreme Court should be denied

Respectfully submitted,

GRADY A. PALMER
Assistant City Attorney

RONALD S. HALLMAN
City Attorney

OFFICE OF THE CITY ATTORNEY
306 Cedar Road
Chesapeake, Virginia 23322
(757) 382-6586 (Telephone)
(757) 382-8749 (Facsimile)

Counsel for Respondents

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[10] The petition cites *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) but that case only involved a holding on what is required to plead a class of one to survive a FRCP 12(b)(6) motion. In this case, the trial court determined that the petitioners' evidence offered at trial did not support the claim.